RAJA IZZUDDIN SHAH v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim Yeop A. Sani J.) November 8, 1978]
[Ipoh Criminal Appeal No. 50 of 1978]

Criminal Law and Procedure — Appeal — Sentence — Assaulting a public officer — Mitigation — Public interest — Criminal Procedure Code (F.M.S. Cap. 6), s. 294(i).

Penal Code — s. 353 — Assaulting a public servant — Mitigation.

In this case the appellant had pleaded guilty and been convicted of the offence of assaulting a public servant and had been sentenced to three months' imprisonment. He appealed against the sentence.

Held: (1) there were matters pleaded in mitigation in this case and these should have been considered by the learned Magistrate in imposing sentence;

(2) no plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution;

(3) in this case having regard to all the facts before the court the public interest would in no way be better served by committing the appellant to prison. The public interest would be best served by setting aside the sentence of imprisonment and substituting therefor an order under section 294(i) of the Criminal Procedure Code that the appellant should enter into a bond with one surety in the sum of $1,000 for a period of two years and in the meantime to keep the peace and be of good behaviour.

CRIMINAL APPEAL.

Datuk Seri V. Jeyaratnam for the appellant.

Shaik Daud, Legal Adviser, Perak, for the respondent.

Hashim Yeop A. Sani J. (delivering oral judgment): On June 24, 1978 the appellant pleaded guilty to and was convicted of a charge under section 353 of the Penal Code for assaulting a public servant namely, P.C. 49070, Mohd. Zahari bin Abdullah, while in the execution of his duty as such public servant. The appellant was sentenced to three months' imprisonment. The appeal now is only against sentence.

The facts are clearly set out in the grounds of judgment of the learned magistrate and I will only repeat them.

"As part of the celebrations of the birthday of D.Y.M.M. Sultan Perak a Pesta was held on 11.8.77 in the compound of Istana Iskandariah Kuala Kangsar. On that day at about 6 p.m. the complainant P.C.49070 with another PC were on traffic duty in front of the gate leading to the Istana. It was instructed that no car without a specific car sticker be allowed to go into the Istana compound for the purpose of controlling traffic. On that day a "no Entry" sign was placed in the middle of the road which ran off to the right of the road leading to Istana compound. The complainant was on duty at the spot where the "No Entry" sign was placed. At about 7 p.m. a green Ford Escort BAB 8834 driven by a lady coming in the direction of the town drove into this side road without regard to the presence of the "No Entry" sign and the policeman on duty. About 10 minutes later the same car driven by the same driver came out from the direction from where she went earlier, drove past the "No Entry" sign and straight into the Istana compound. There was no sticker to this car. Shortly thereafter the same car driven by the same driver came out from the Istana compound. The complainant stopped her and told her that she had on two occasions violated the traffic sign and the offence thereby committed by her, politely. She kept quiet and drove off in the direction of a house nearby. Shortly thereafter a person claiming to be the husband of the driver went up to the complainant and reprimanded him for doing what he had lawfully done. He then left the place.

At about 10 p.m. on the same day the accused went to the police guardroom near the gate to the Istana. He asked the Cpl. in charge to call the complainant. On being told that the complainant was on duty at the spot where the "No Entry" sign was placed he went up to him and asked him whether he was the PC who had earlier stopped motor-car BAB 8834. When complainant admitted doing so he asked him to follow him back to the guardroom, which the complainant did. In the guardroom in the presence of the Cpl. and another PC he scolded the complainant for his lawful action. The accused was then seated on a chair. He asked the complainant to stand at attention. When the complainant refused to do so for obvious reasons the accused stood up and slapped the complainant. He then dragged the complainant by the shirt and pushed him against the wall. But for the intervention of Cpl.2686 who was there at the time of the assault the accused would have assaulted the complainant further. The complainant did not retaliate. A police report was lodged the following day and complainant was sent to the Hospital for medical examination. Medical examination disclosed the following injuries:—

2 small abrasions measuring 1¼ cm. × ¼ cm. on the left cheek with mild underlying swelling."

In mitigation it was submitted firstly that the appellant was at the time of commission of the offence under the influence of liquor and as soon as he recovered later in the evening, he went to the OCPD Kuala Kangsar and apologised to the latter. Whilst under the influence of liquor he had thought that the complainant was being unreasonable to the lady as the road which was subject to the "No Entry" sign was the only access road to the lady's house. It was also brought out in his mitigation that he had suffered humiliation with the criminal proceeding as he was a member of the Royal Family in the State and he has therefore suffered enough and then assured the court that he would not repeat the same mistake. It was also submitted in mitigation that the offence was committed in the privacy of the guardroom of the Istana and not in a public place. Finally, it was submitted that the appellant was a first offender.

In his grounds of judgment the learned magistrate seemed to be unduly influenced by the submission of counsel for the prosecution that the plea in mitigation *did not* amount to a mitigation at all and therefore rejected all of them. I disagree. No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

Considering all the facts before the court I have come to the conclusion that the public interest is in no way better served by committing the appellant to prison. The primary purpose of punishment is reformatory and it is clear in this case that the appellant has realised the fact that notwithstanding his status he is not above the law. He has also clearly stated that he has repented and would not make the same mistake again. Under the circumstances it is my opinion that the public interest is best served by setting aside the sentence of imprisonment and substituting therefor an order under section 294(i) of the Criminal Procedure Code that the appellant enter into a bond with one surety in the sum of one thousand dollars for a period of two years and in the meantime to keep the peace and be of good behaviour.

With regard to the injuries caused on the complainant I would in addition to the above order make

another order under section 426(i)(b) of the Criminal Procedure Code that the appellant do pay a compensation in the sum of $200 to the complainant within one month from the date of this order. Counsel shall inform the Registrar when the order has been complied with.

Order accordingly.

Solicitors: *Cheang Lee & Ong.*

IPOH GARDEN BHD. v. PENGARAH TANAH DAN GALIAN, PERAK, IPOH

[O.C.J. (Hashim Yeop A. Sani J.) November 13, 1978]
[Ipoh — Originating Motion No. 43 of 1977]

Land Law — Application for sub-division of land — Condition for approval that certificates of title to be surrendered to Government and exchanged for 99 year leases — Condition ultra vires — National Land Code, ss. 42, 92, 136, 138, 195 — Federal Constitution, art. 13.

Constitutional Law — Rights to property — Federal Constitution, art. 13.

The applicant asked for an order that the decision of the respondent pursuant to the application for sub-division of the applicant in respect of certain lands be varied. The applicant sought to vary the decision in so far as it related to the question of the surrender of the said lands and the issue of leasehold titles in lieu of the freehold titles. The applicant also asked the court to direct the respondent to approve the application for sub-division without imposing the conditions objected to.

On behalf of the respondent it was argued that the letter of the respondent contained an offer not a decision.

Held: (1) the letter of the respondent sought to impose conditions for the approval of the application for sub-division which were *ultra vires* the National Land Code;

(2) the application for sub-division should be referred back to the relevant authority for reconsideration according to law.

Cases referred to:-

(1) *Sri Lempah Enterprise Sdn. Bhd.* v. *Land Executive Committee, Federal Territory* [1979] 1 M.L.J. 135 at 136.

(2) *Pengarah Tanah dan Galian, Wilayah Persekutuan* v. *Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 M.L.J. 135 at 142.

(3) *Sungai Biak Tin Mines* v. *Saw Choo Thong & Anor.* [1970] 2 M.L.J. 226.

ORIGINATING MOTION.

R.R. Chelliah (Dato Seri V. Jeyaretnam, Dato Sheikh Abdul Rahman and *N.H. Chan* with him) for the applicant.

Shaikh Daud, Legal Adviser, Perak, for the respondent.

Hashim Yeop A. Sani J.: This is a Notice of Motion in which the applicant/appellant, Ipoh Garden Berhad, a housing developer, is asking for an order that the decision of the Pengarah Tanah dan Galian, Perak, contained in his letter dated August 23, 1977 pursuant to application for sub-division of the applicant/appellant in respect of certain lands be varied. It appears from the Notice of Motion that the appeal is against the said decision "insofar as it relates to the question of the surrender of the said lands and the issue of leasehold titles in lieu of the freehold titles." The applicant is also asking that the court *direct* the respondent to approve the application for sub-division aforesaid in the terms of the aforesaid letter with the exception of certain conditions imposed in that letter, the most important among which was that the lots comprised in the sub-divided titles would be held under leases for 99 years.

A little background of the facts of the case is necessary. On May 18, 1976, the applicant pursuant to section 135 of the National Land Code applied to the State Authority for sub-division of the applicant's lands held under *freehold titles* namely, Certificates of Titles Nos. 5801, 5869, 9031, 9032, 9033, 9034, 9035, 9036, 9037 for Lots Nos. 25238, 25241, 29864, 29865, 29866, 29867, 29868, 29869 and 29870 respectively, in the Township of Ipoh. Pursuant to the said application the respondent by his letter dated August 23, 1977 (i.e. nearly sixteen months later) gave his reply to the applicant. In his letter the respondent informed the applicant that the State Government would be prepared to approve the building scheme to be undertaken by the applicant in accordance with the proposal for sub-division upon the terms and conditions as set out in the letter. Other than the usual terms, the terms and conditions contained in the said letter include the following: —

(1) The applicant to voluntarily surrender the said land held under the said Certificates of Titles to the government upon which surrender sub-divided titles would be issued.

(2) That the lots comprised in the sub-divided titles would be held under leases for 99 years.

It is primarily with these two conditions that the applicant feels aggrieved. The applicant filed an affidavit dated November 25, 1977 setting out the grounds upon which it purports to rely to obtain an order from the court to declare that the said terms as contained in the letter of the respondent referred to above are *ultra vires* and/or null and void of the National Land Code and/or the Constitution of Malaysia in that, *inter alia,* —

(1) in accordance with section 138 of the National Land Code the State Commissioner has no alternative but to approve the application for sub-division where the conditions specified in sub-section (1) of section 136 are satisfied;

(2) nowhere in the National Land Code are there any provisions that the respondent can impose on the applicant for sub-division the condition requiring the surrender of the lands in question;

(3) no provisions in the National Land Code whereunder upon approval for sub-division the respondent has the power to change the terms of the holding of the said lands from freehold to leasehold titles; and

(4) the decision of the respondent contained in the said letter is an infringement of the proprietary rights of the applicant and therefore contrary to article 13 of the Constitution of Malaysia which provides that no person shall be deprived of his property save in accordance with law.

In the affidavit of the respondent he contends that his letter dated August 23, 1977 did not pur-